

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original & Affidavit of Mailing

77-1123

To be argued by
STANLEY A. TEITLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1123

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSE NUNEZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

ALVIN A. SCHALL,
STANLEY A. TEITLER,
*Assistant United States Attorney
Of Counsel.*

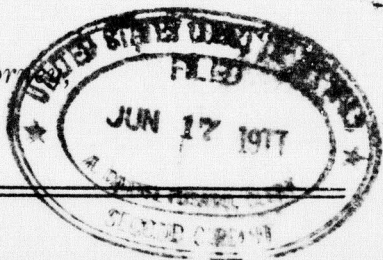


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. The Government's Case	2
B. The Defense Case	12
ARGUMENT:	
POINT I—The District Court Was Clearly Not Er- roneous In Ruling Admissible at Trial Appel- lant's Post Arrest Statements	12
A. The Nature of the Proof at the Pre-trial Suppression Hearing and the Court's Findings	13
POINT II—The District Court Properly Admitted Testimony Concerning Prior Similar Acts	21
POINT III—The Prosecutor's Summation Was Not Prejudicial And Did Not Deprive Appellant of a Fair Trial	26
POINT IV—Appellant's Sentence Was Proper	41
CONCLUSION	42

TABLE OF CASES

<i>Battel v. United States</i> , 209 U.S. 36 (1908)	39
<i>Driver v. United States</i> , 232 F.2d 418 (4th Cir. 1956)	42
<i>Griffin v. California</i> , 380 U.S. 609 (1965)	39-40
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	6, 13

	PAGE
<i>Mitchum v. United States</i> , 193 F.2d 55 (5th Cir. 1951)	42
<i>United States v. Armedo-Sarmiento</i> , 545 F.2d 785 (2d Cir. 1976)	40
<i>United States v. Benter</i> , 457 F.2d 1174, (2d Cir.), cert. denied, 409 U.S. 849 (1972)	38
<i>United States v. Catalano</i> , 491 F.2d 268 (2d Cir.), cert. denied, 418 U.S. 825 (1974)	22
<i>United States v. Danna</i> , 450 F.2d 1201 (2d Cir. 1971)	38
<i>United States v. Deaton</i> , 381 F.2d 114 (2d Cir. 1967)	21
<i>United States v. DeSapio</i> , 1435 F.2d 272 (2d Cir. 1970)	23
<i>United States v. Drummond</i> , 481 F.2d 62 (2d Cir. 1973)	39
<i>United States v. Duvall</i> , 537 F.2d 151 (2d Cir.), cert. denied, 426 U.S. 950 (1976)	20
<i>United States v. Hestie</i> , 439 F.2d 13 (2d Cir. 1971)	38
<i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966)	38
<i>United States v. Johnson</i> , 525 F.2d 999 (2d Cir. 1975)	21
<i>United States v. LaSorsa</i> , 480 F.2d 522 (2d Cir.), cert. denied, 414 U.S. 855 (1973)	39
<i>United States v. Leonard</i> , 524 F.2d 1076 (2d Cir. 1975)	21
<i>United States v. Mattio</i> , 388 F.2d 368 (2d Cir.), cert. denied, 390 U.S. 1043 (1968)	39
<i>United States v. Mauro</i> , 507 F.2d 802 (2d Cir. 1974), cert. denied, 420 U.S. 991 (1975)	12

	PAGE
<i>United States v. Miller</i> , 478 F.2d 1315 (2d Cir.), cert. denied, 414 U.S. 851 (1973)	21
<i>United States v. Papadakis</i> , 510 F.2d 287 (2d Cir.), cert. denied, 421 U.S. 950 (1975)	23, 24
<i>United States v. Payden</i> , 536 F.2d 541 (2d Cir. 1976)	23
<i>United States v. Puco</i> , 436 F.2d 761 (2d Cir. 1971)	39
<i>United States v. Reed</i> , 526 F.2d 740 (2d Cir. 1975), cert. denied, 424 U.S. 956 (1976)	20
<i>United States v. Rodriguez</i> , 545 F.2d 829 (2d Cir. 1976)	40
<i>United States v. Rodriguez</i> , slip op. at 3434 (2d Cir. May 11, 1977)	40
<i>United States v. Rosenwasser</i> , 550 F.2d 806 (2d Cir. 1977), petition for cert. pending, — U.S. — ...	22
<i>United States v. Teresi</i> , 484 F.2d 894 (7th Cir. 1973)	42
<i>United States v. Torres</i> , 519 F.2d 723 (2d Cir.), cert. denied, 423 U.S. 1019 (1975)	21
<i>United States v. White</i> , 486 F.2d 204 (2d Cir. 1973)	38
<i>Williams v. United States</i> , 168 U.S. 332 (1897) ...	38

Statutes Cited

18 U.S.C. §§ 472 and 2	1
18 U.S.C. § 3651	1, 41
Rule 12(f) Federal Rules of Criminal Procedure ...	12
Federal Rules of Evidence, 404(b)	21
Federal Rules of Evidence, Rule 403	22

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1123

UNITED STATES OF AMERICA,

—against—

JOSE NUNEZ,

Appellee,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Jose Nunez appeals from a judgment entered on February 17, 1977, after a jury trial in the United States District Court for the Eastern District of New York (Pratt, J.), which judgment convicted both appellant and Benito Nunez of unlawful possession of counterfeit federal reserve notes, in violation of 18 U.S.C. §§ 472 and 2. Appellant was sentenced to a term of three years imprisonment pursuant to 18 U.S.C. § 3651, six months to be served in a jail type institution, with execution of the remainder of the sentence suspended and appellant placed on probation for a period of four years, to commence upon his release from confinement.

Appellant is presently enlarged on bail pending the outcome of this appeal.¹

Appellant here understandably does not challenge the sufficiency of the evidence against him. He claims instead that the district court (1) was clearly erroneous in finding at a pre-trial suppression hearing that he knowingly waived his *Miranda* rights; (2) committed reversible error in connection with the Government's introduction of evidence establishing prior similar criminal conduct by him; and urges that (3) portions of the prosecutor's summation were prejudicial and inflammatory; and that (4) the court improperly sentenced him to an excessive probationary period.

Statement of Facts

A. The Government's Case

In early November 1975, Allen Miller, an eighteen year old shipping clerk, then earning \$84 per week for his labors, placed an advertisement in Buy Lines, a consumer oriented buy-sell newspaper, in an effort to sell various stereo component parts (334-7). In or about mid-November, Jose Nunez, then sporting a cast on one of his legs, and two others of Hispanic descent, appeared at Miller's home at a New York City housing project on Nostrand Avenue in Brooklyn, New York, an apartment where Miller resided with his invalid mother. Miller sold one of his components to appellant after a price of

¹ Appellant's accomplice and cousin, Benito Nunez, chose not to appeal from his conviction. Judge Pratt sentenced Benito to a term of confinement in accordance with the provisions of the Youth Corrections Act, 18 U.S.C. § 5010(b), leaving Benito's discharge from confinement within the discretion of the United States Board of Parole pursuant to 18 U.S.C. § 5017.

\$90.00 was negotiated. Although Jose Nunez and at least one of his two friends expressed an interest in purchasing all of Miller's for-sale component parts, they did not have sufficient funds to culminate the deal at the time. All negotiations culminating in the sale of the component were conducted in English (342-3).

On December 2, 1975, in response to the same November Buy Lines advertisement, Miller received a telephone inquiry from appellant who described his name to Miller as "Joe". Appellant questioned Miller as to the availability of the remaining component parts, but Miller complained that he had already sold them to another purchaser. Miller, a stereo hobbyist and enthusiast, did, however, inform appellant that he was in possession of other stereo equipment which he was willing to sell for \$500.00. Miller asked "Joe" for his telephone number, and one hour later in his attempt to contact Joe, learned from an elderly lady that "Joe" did not reside at the telephone number's location. Again Miller dialed the identical number only to receive the same explanation. Finally, appellant conversed with Miller again, having called to tell him that although he was in Miller's neighborhood he could not locate the proper building. Miller attempted to elicit from appellant the reason for the improper telephone number, but appellant responded that Miller had probably dialed the last digit improperly. After informing appellant of the appropriate directions to his house and that he would meet him in the lobby, Miller placed another telephone call to the now questionable true residence of appellant. Not surprisingly, a child answered the phone and exclaimed that no "Joe" was there and hung up (343-4; 378-80).

Shortly thereafter, at 8:30 P.M., Miller met Jose and Benito Nunez in the lobby of his apartment. He escorted them to the elevator and brought them to his apartment

² Numbered references are to pages of the trial transcript.

where they viewed his stereo equipment located in his bedroom. Miller showed them the equipment and activated the receiver. The Nunezes hastily tested the machinery and agreed to buy it for the \$500.00 asking price. The Nunezes also expressed keen interest in purchasing Miller's police scanner, but they only had approximately \$45.00 in cash, twenty dollars less than Miller's asking price of \$65.00. The \$45.00 was taken taken out of one of the Nunez's pants pocket and appeared to have been folded (344; 350; 360-67; 369-73).

Although appellant asked Miller about the stereo instruction booklets, when Miller explained to them that their production would take him approximately fifteen minutes, the Nunezes claimed that they could not wait that long. Instead, appellant removed \$500.00 in crisp counterfeit bills from his jacket pocket and handed the phoney money to Benito. Benito counted the bills and handed them to Miller. Upon their receipt, Miller immediately and excitedly counted the funds, concentrating only on the dollar figures found on the bills' upper and lower corners. When Miller asked where the Nunezes had gotten such new money appellant replied that it was from "a bank." (381-83). Miller then rushed the money into his mother's adjacent room, obviously delighted because he knew that he was now able to purchase a replacement for his mother's damaged television set. The Nunezes declined to remain to retrieve either the machinery warranties or instruction booklets and told Miller that they would call him that night or the next morning to arrange for their pick-up (347-353). The duration of this informal but rather hasty transaction took approximately one-half hour, during which time both appellant and Benito spoke entirely in English. At its completion, Miller offered to assist the Nunezes in transporting the equipment to their vehicle. He took one piece down-

stairs, while they each likewise carried one component. Although Miller insisted upon helping them outside, the Nunezes refused his offer and departed the building alone (354-5).

Once he returned to his apartment, Miller scattered the counterfeit bills on a table and stared at them for five minutes, with the desire of "calling someone to tell them how much money he had". Suddenly he realized that the bills "didn't feel right" and that each of the serial numbers was identical. Miller immediately called the Federal Bureau of Investigation which, in turn, referred him to the United States Secret Service. Simultaneously with his conversation with Secret Service, a beeping sound was heard on Miller's telephone notifying him of another incoming call. The caller was New York City Detective John Timko (355-357).

As the Nunezes were hauling the stereo equipment into their vehicle on Nostrand Avenue at Avenue W, Detective Timko and his partner observed them placing the stereo into their car. He followed them as they drove away, and after driving in tandem for six or seven blocks, he pulled them over, identified himself and requested to see Benito's driver's license. Both Nunezes stated in English that they had purchased the equipment from Allen Miller but that they were not in possession of a bill of sale. They readily agreed to accompany the detective to the 61st Precinct in Brooklyn (395-400). Timko proceeded to drive the Nunez vehicle from this high crime burglary area to the station house, and during the ride both he and the Nunezes engaged in general conversation in English. Upon reaching the police station, Timko notified Allen Miller that two suspects had been apprehended with stereo equipment claiming that they validly purchased it from him. Miller promptly informed Timko of the accuracy of the suspects' claims, but added that the pur-

chase was effected through the use of counterfeit notes. Thereafter, Miller traveled to the 61st precinct in Brooklyn and later identified appellant, Benito and the counterfeit money (356-359; 400).

After learning from Allen Miller that the stereo equipment was purchased by the Nunezes with counterfeit money, New York City Police Officer Andrew Pannicko read to them their rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966), and then placed them under arrest. Appellant then told Officer John Hunt that he could not speak English. Benito, on his own volition and suggestion, acted as interpreter for appellant, who made no statements. Benito told Hunt that he, Benito, had purchased the counterfeit money on 125th Street in Harlem. Benito claimed that he was an unemployed cab driver who had been born in Santa Domingo. Appellant, also from Santo Domingo, was merely unemployed without occupation and also was known by the alias "Guzman". Both Nunezes possessed New York State driver's licenses (417R-V; 435-38; 480-81).

Secret Service Agents Douglas Ferry and Brooks Keller took federal custody of the Nunezes, arrested them and transported them to Secret Service headquarters in Manhattan. Once there, after being advised of his *Miranda* rights in English, appellant, never claiming that he did not understand English or requesting an interpreter, explained certain of the details of the crime to Special Agent John Vezeris. Appellant in a fifteen minute conversation admitted that he knew the notes were counterfeit, passed them to Allen Miller, and had received them from a black male in the area of 125th Street and Lenox Avenue in Harlem the Sunday prior to his arrest. Appellant, however, adamantly refused to reveal the black man's identity (484-89).

Benito Nunez was likewise interviewed. After Agent Robert Hast informed Benito of his rights, Benito acknowledged that the money utilized to purchase the stereo was counterfeit, and that his cousin, appellant, had given the phoney money to Allen Miller. Benito also admitted that several hours earlier that day he had personally negotiated to sell counterfeit money. Hast revealed to him that his potential buyer earlier that day had in fact been an undercover agent of the United States Secret Service (652-54; 658-60).

In addition to evidence of the passing of the counterfeit money, the prosecution also presented prior similar crimes testimony to show knowledge and intent.

The genesis of the Government's awareness of the Nunezes previous criminal conduct began with Ramonisto Perez testifying that he first met Benito Nunez during April 1975, at which time both were attending ECPI, a trade school specializing in undercover techniques, alarm systems, counterfeiting control and narcotics. The course was sponsored by a federal grant of \$1,500.00 per student which covered the full tuition. After one week of course work devoted entirely to counterfeiting techniques, Benito, Perez' classmate, approached Perez and invited him into the bathroom where he displayed two fifty dollar bills and challenged Perez to compare them. Although Perez felt that one of the notes had to be counterfeit, he was unable to discern the difference between the two. Benito explained to Perez, who was apparently astonished that the bills looked so similar, that he had passed the counterfeit note through coffee or tea and hung it to dry so as to perfect a true-like color. Benito proudly proclaimed that he could obtain \$15,000, \$30,000 or whatever amount of counterfeit bills he wanted, and promised that in the future he would supply Perez with a sample (704-7).

The sample was delivered by Benito to Perez on October 22, 1975. Benito cautioned Perez not to fold the

bill and said that if Perez had no problem in passing the bill he, Benito, would provide him with larger packages of bogus currency for sale. Benito requested that Perez stay in contact with him (708-9).

Perez hardly the typical government informant, was studying at the Police Academy and had been an auxiliary policeman since the age of seventeen. His work had included undercover work at Maxwell's Plum restaurant in Manhattan. Voluntary, unilaterally and out of his own sense of right, Perez notified both the New York City Police and Special Agent John Vezeris of his dealings with Benito and turned over to Vezeris the sample counterfeit bill which he had received (702-3; 709; 714-16).

On October 25th, in accordance with Benito's request, Perez telephoned him, only to learn that Benito was in possession of more counterfeit notes but was then unable to deliver them. Benito urged Perez to stay in touch because he would have something for him. Subsequently, on November 19, 1975, Perez again contacted Benito who advised Perez to meet him in a restaurant at 88th Street and Amsterdam Avenue at 4:00 P.M. that day, at which time Benito would have a package for him (716).

On the meeting date, November 19, Secret Service agents drove Perez to 80th Street in Manhattan. Perez walked over to 88th Street, and as he entered the restaurant for the rendezvous, Benito introduced him to appellant and directed him to enter appellant's vehicle, which was parked adjacent to the restaurant. Appellant, limping and wearing a coat, entered the car and Benito drove one block, parking in front of a garage. Benito exited the vehicle, walked inside the garage and Perez conversed with appellant. Benito then returned and told Perez that appellant was "his man". Appellant, in response to Perez'

inquiry, noted that he had broken his leg after a fall caused by his wearing high-heeled shoes. When Benito returned, appellant pulled three counterfeit bills each wrapped in paper out of his jacket pocket. He then handed them to Benito who removed the bills from the wrapper to show to Perez. Benito cautioned Perez not to fold the bills or touch them too much and to place them inside a book that Perez was carrying. The Nunezes then drove Perez to the train station, Benito commenting: "If you can pass them with no trouble, then I can get you a bigger package of Two Thousand, Three Thousand Dollars. Keep in contact with me." (716-18, 728-29).

Acting at the direction of the Secret Service, Perez thereafter called Benito, telling him the bills were good, in that they "passed" and that he wanted a bigger package. Benito's price was 40 points on the dollar, and he agreed to deliver \$3,000.00 worth of bills. Perez told Benito he had a customer and Benito scheduled the sale for 6:00 P.M. on December 2, 1975 at the same restaurant where the pair had met previously (740-41).

On December 2nd, the same day as the passing of the counterfeit money to Allen Miller, Agent Patrick McCool accompanied Perez to the rendezvous posing as Perez' buyer for the counterfeit money which would be obtained from Benito. At approximately 6:00 P.M. Perez and the agent arrived at the restaurant and parked their car in front. Benito greeted them at the door and escorted them to his table where he was working on car registrations and bills. Appellant and others were seated at the counter. After Perez greeted appellant, Benito exclaimed that he, Perez, was late in arrival. Agent McCool suggested that they ought to converse outside of the restaurant. Appellant then accompanied Benito, Perez and McCool. McCool demanded the money from Benito, but

Benito claimed again that they had arrived too late. Perez told Benito that if Benito was unable to supply the counterfeit money he would get Perez into trouble, to which Benito responded, "Don't worry about it, you're going to get it. I want to deal with my own people. Don't bring me no blacks, no white guys." Perez, of course, was himself, like the Nunezes, of Hispanic origin. McCool then reentered the conversation and further pressed Benito for the money. Benito agreed that they should call him at 11:00 P.M. that evening at which time he would have the money. McCool offered to pay for the samples but Benito refused, expressing his willingness to receive payment upon McCool's receipt of the bigger package to be delivered that night. Throughout this discourse, appellant stood eighteen to twenty feet from Benito in front of the restaurant, in a position that allowed him to overhear the conversation (744-45).

Due to the arrest of the Nunezes later that evening, however, the purchase of the counterfeit money by the undercover agent never took place (741-46).

Various Secret Service agents corroborated Perez's testimony.

Agent Vezeris testified that on December 2, 1975, at approximately 4:00 P.M., he traveled to 88th Street to participate in a surveillance of the meeting where McCool was scheduled to purchase the package of counterfeit notes from appellant Jose and Benito. Vezeris, observing the scene through the window of a Ford van, observed McCool arrive with Perez at the Companion D'oro Restaurant. McCool and Perez were greeted at the restaurant's entrance by Benito. Appellant was observed inside the restaurant near the windows. A short time later, McCool, Perez and Benito exited the restaurant and walked toward the government vehicle. Appellant stood outside, apparently observing the

conversation. McCool then went to a telephone booth, made a telephone call and returned to the area of the restaurant. McCool and Perez then re-entered their government vehicle and departed the area. Shortly thereafter, Benito and appellant entered their car and also left the scene (501-505).

On November 19, 1975, Vezeris had also proceeded to the 88th Street restaurant for the surveillance of a meeting between Perez and Benito Nunez. After Vezeris observed that Perez did in fact meet the Nunezes, surveillance was discontinued. Vezeris also identified three sample counterfeit bills as having been given to him by Perez, one on October 22, 1975, and two on November 19, 1975 (505-509).

Special Agent Patrick G. McCool testified that he met with Perez on December 2, 1975. Subsequent to this meeting McCool drove with Perez to 88th Street and Amsterdam Avenue in Manhattan. McCool testified that he was then introduced by Perez to Benito, who discussed with him the sale of the \$3,000 package of counterfeit notes. McCool asked Benito whether the quality of the package would be similar to that of the three sample notes which he had already received from Perez. Benito affirmatively replied but informed McCool that he, McCool, had arrived ten minutes too late to deal because Benito's supplier had already left. Benito claimed that "his man" had been waiting for McCool since 4:00 that afternoon—it was now 6:00 P.M. Benito agreed, however, to deal with McCool at 11:00 P.M. that night, at which time he could arrange for the sale of the package of counterfeit bills. McCool provided Benito with an undercover telephone number and offered to pay Benito for the two sample notes, but Benito responded that he could pay for them that night. During these negotiations, appellant stood in a doorway nearby (679-687).

In addition to the testimony of McCool and Vezeris, Agent Robert Hast explained to the jury that he had accompanied Vezeris and Agent John Simon on December 2 as part of the surveillance term. Hast recounted that he saw Agent McCool and Benito Nunez engaged in conversation while simultaneously observing appellant "looking on." (660-662).

B. The Defense Case

Neither appellant nor Benito Nunez testified at the trial. The sole witness called by the defense was Edward Clay, an investigator for the Legal Aid Society. Through Clay, the defense sought to suggest that appellant obtained the counterfeit \$500.00 through gambling. Clay, who had been a police officer and who had training in the investigation of gambling offenses, stated that in gambling parlance the term "bank"—appellant had told Miller that he got the crisp counterfeit bills from a "bank"—was the place where people who played the Spanish numbers game "bolita" went to get paid if they won (880-85).

ARGUMENT

POINT I

The District Court Was Clearly Not Erroneous In Ruling Admissible At Trial Appellant's Post-Arrest Statements.

On the day of trial, on no specified ground and over the vigorous objection of the prosecution which claimed that under *United States v. Mauro*, 507 F.2d 802 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975), and Rule 12(f) of the Federal Rules of Criminal Procedure he had waived his rights, appellant, without any showing,

orally moved for suppression of his post-arrest statements. At the hearing, appellant claimed that no advice as to his constitutional rights had been offered, but that if it was he did not understand it because he purportedly was equipped with only a limited understanding of English. In short, appellant placed in sharp dispute the credibility of the government agents who testified at the suppression hearing by inconsistently and incongruously claiming, in essence, that the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), were not duly administered and, if they were, he did not have sufficient knowledge of the English language to comprehend them.

On appeal, appellant claims that he failed to knowingly waive his rights, and that these rights, communicated to him in English, were not administered in a fashion calculated to trigger his understanding of them. Appellant concludes his disingenuous argument by reasoning that the district court was clearly erroneous in its findings of fact when it ruled that the Government had met its burden of proof by a preponderance of the evidence that his statements were in fact voluntarily made. As we show below, there is not a scintilla of evidence to support these meritless contentions. We first review the suppression hearing itself.

A. The Nature of the Proof at the Pre-trial Suppression Hearing and the Court's Findings

The suppression hearing commenced with the testimony of Agent John Vezaris. Vezaris explained that at the time of his interrogation of appellant on December 2, 1975 he knew both Nunezes from his surveillance of them earlier that day in connection with the proposed sale of counterfeit money to Perez and undercover Agent McCool. In response to Vezaris' recitation of the *Miranda* warnings to him, appellant replied that he un-

derstood his rights and that he was willing to reply to questions regarding his involvement in the case. During the course of the ensuing fifteen to twenty minute interrogation, appellant never expressed a lack of English comprehension, nor did he ever evince any difficulty in appreciating the nature of his rights. Moreover, at no time did appellant ever request either an interpreter or an attorney (6-8). Vezeris, rather expectedly, never had reason to either challenge, question or quarrel with appellant's fluency of the English language.

During the course of this session at Secret Service headquarters in Manhattan, appellant remained seated at a desk in a large room and was emotionally calm and spoke in a natural voice tone. In short, as Vezeris noted, appellant displayed no unusual or abnormal outward signs of either psychological stress or physical distress (12; 21-22; 24-26)

Within this atmosphere, and after Vezeris physically displayed the counterfeit notes to him, appellant orally revealed that he was earlier that day in possession of the bills at Miller's home, that he himself had passed them, and that on Saturday, November 29, 1975 he in fact purchased them from a black male on 125th Street and Lenox Avenue in Harlem, knowing the notes to have been counterfeit. Nunez repeatedly refused to discuss with specificity the identity of his black supplier and the surrounding circumstances of the purchase, although he did assert that he never dealt with this source prior to the 29th. Because Vezeris knew that previous Secret Service investigative efforts had established that the subject denomination notes were exclusively of Dominican origin and distribution, once appellant in vain attempted to persuade Vezeris that he bought the bills from a non-Hispanic source, Vezeris had more than ample

reason to doubt the candor of appellant's story. When appellant further attempted to "hedge" his responses on this score, Vezeris decided that further inquiry would be pointless and he consequently terminated the interview. Appellant adamantly refused to execute a written waiver of his rights, and likewise declined to reduce his admissions to writing (12-14; 37; 41-45).

Appellant chose to testify on his own behalf through the use of an interpreter, who was present throughout both the suppression hearing and later the trial itself. He claimed that he did not remember engaging in any discussions whatsoever with any agents of the Secret Service, nor did he ever speak with Agent John Vezeris. He flatly denied having been questioned as to the nature of his December 2nd activities, and strenuously refused to admit that he had been shown the counterfeit money during any stage of the interrogation. According to appellant, the agents at most merely "processed" him. However, after further prodding and leading by his trial counsel, appellant admitted that agents did converse with him in English and that he understood the language "a little". At first appellant did not recall whether he was advised of his rights to remain silent and to obtain counsel. "To be truthful", he asserted, he was unable to recollect what, if anything, had occurred subsequent to his arrest (97-102). Oddly enough, appellant stated that the agent who photographed and fingerprinted him was Spanish-speaking, and although appellant allegedly demanded that all of the agents interrogate him in his native tongue, they each declined to do so. While initially appellant was unable to identify this Spanish-speaking agent, his memory search revealed him to have been blonde and tall, a white who looked Argentinian or Spanish. Appellant did ultimately admit that he did in actuality advise Agent Vezeris that he received the counterfeit money used to purchase Miller's stereo from "a man he did not know" (102-105).

Cross-examination revealed that for eight years appellant had resided in the United States. Appellant drove an automobile here and was the holder of a New York State driver's license. He shopped for food in New York, conversed with people in English, and, as a handyman in a Manhattan apartment building, he dealt both with English and non-English speaking tenants, but supposedly communicated with English-speaking only through his supervisor. Appellant confirmed that his trial counsel explained to him without interpreter the legal concept of double jeopardy and that he could certainly read the English words written on his driver's license (105-110).

Appellant was unable to recall the number of times he requested an attorney on December 2nd, but he was more than confident that Vezeris never advised him of his rights to consult one and have him present. Appellant twice asserted that Vezeris never told him of his right to remain silent. He did, however, concede that he communicated to Vezeris in English various items of his personal history, but he refused to acknowledge that he had participated in any discussions with Allen Miller, although he did admit to the transaction itself. He also denied speaking to any New York City police agents and disclaimed any reference that he may have made to a black man in Harlem (116-119; 122-25).

Appellant stated that during questioning he never expressed a refusal to continue with the session. He further urged that he did not understand the meaning of the word "silent", although subsequent to the filing of his indictment he became better equipped to understand legal terminology. Appellant further recounted that he did not understand the written waiver of rights form presented to him by Vezeris. He agreed that he responded in English to Vezeris' inquiry as to where

and from whom he obtained the bills, but he simultaneously claimed that he did not understand the question. Although he vigorously stressed that he was unable to adequately comprehend the nature and scope of Vezeris' inquiries, appellant, not surprisingly, acknowledged his total failure to inform Vezeris of his purported lack of understanding of the substance of their discussion (125-128; 130-32).

In rebuttal, the Government recalled Agent Vezeris, who testified that on December 2, 1975, there were no agents in his office who were blonde haired and spoke Spanish. Vezeris, a heavy-set black haired individual, was the sole agent who administered the fingerprint procedures to appellant. He was unable to recall whether he or another agent had photographed appellant during the processing portion of Secret Service procedures (138-39).

Special Agent Douglas Ferry explained to the Court that he and his partner, Agent Brooks Keller, were responsible for placing the Nunezes in federal custody. Agent Keller placed the Nunezes under federal arrest at the 61st Precinct in Brooklyn and advised them in English of their rights and the nature of the charge. Neither Ferry nor Keller chose to interrogate because it was nearly the end of their shift. Ferry recounted that both Nunezes acknowledged their understanding of the *Miranda* warnings by stating "I do", and that at no time did either appellant or his cousin, Benito, indicate to either agent that he did not understand what was happening, nor did either request or indicate that he was in need of an interpreter (150-54).

Appellant in surrebuttal retook the stand. In a surprising maneuver he reversed his previous description of the unidentified Spanish-speaking agent by claiming that

his recollection was that he was tall, slim, white and brown haired (180). On cross-examination the prosecutor reminded appellant that during the previous day's testimony appellant swore that because it was "a long time ago it wouldn't be possible to describe [him] exactly". Appellant claimed that he did not even remember being posed this question (182-83). At one point during the cross-examination the appellant not surprisingly replied "yes, blond, tall and rather slim . . ." to the inquiry that "one thing you knew yesterday was that he had blond hair?" (183).

After the Court had rendered its initial findings denying the defense motions to suppress, the Assistant United States Attorney discovered that the local officers who initially took custody of the Nunezes had interrogated them and that appellant had expressed at least at one point in time his difficulty with English. All parties agreed to re-open the hearing (211-218).

Detective John Hunt recounted his version of the facts, which he later described for the jury. On the issue at hand, Hunt testified that he engaged in a conversation with both Nunezes and that while "Jose claimed he could not speak too much English, he understood" (221). Hunt explained that Benito had originally stated that they had purchased the stereo from Allen Miller, and that prior to the point where contact was successfully made with Miller, both appellant and Benito were merely under investigation. Once Miller was contacted by Hunt, the Nunezes were placed under state arrest and given their *Miranda* warnings. When Jose "claimed" that he could not speak English, Benito voluntarily acted as interpreter and translated into Spanish the *Miranda* rights for him. Although appellant

made no statements to the police, Benito did inform them that the counterfeit money was purchased in Harlem (220-222; 226-228).

Detective John Timko, who also testified at trial, explained that when he had driven both Nunezes to the 61st Police Precinct, they both communicated to him in English during a general discussion as to where they purchased the stereo equipment. In addition, he confirmed that when he initially apprehended the Nunezes they responded entirely in English to his investigative questions as to their identity, whether they had a bill of sale, the identity and location of the stereo's original owner and whether they would voluntarily accompany Timko to the station house (252-256).

At the conclusion of the suppression hearing, and prior to the testimony of Timko and Hunt, Judge Pratt denied the motion to suppress the post-arrest statements of both appellant and Benito Nunez. With respect to appellant, the Court stated that it found credible and believed the testimony of Agent Vezeris concerning the questioning of appellant on December 2, 1975. At the same time the Court found to be incredible and not worthy of belief appellant's testimony at the suppression hearing that he did not speak English and that he could thus not understand the *Miranda* warnings. Accepting the Government's version of the facts, Judge Pratt concluded that appellant did understand the *Miranda* warnings, that he knowingly waived his constitutional rights and that his statements to Agent Vezeris were voluntarily made (206-210).

Likewise, at the conclusion of the testimony of the police officers, the Court found that "I have heard nothing this afternoon which causes me to change my overall

evaluation of the credibility or lack of it of the defendant Jose" and, based upon the entire record and the new evidence, Judge Pratt denied that branch of the suppression motion as it applied to appellant (285).

The foregoing analysis of the evidence adduced at the suppression hearing makes clear that Judge Pratt was entirely correct in his findings of fact and conclusions of law. The proof reveals, and it is conceded (Br. at 29), that appellant's testimony at the hearing was incredible. The plain fact is that appellant understood English and that he understood his *Miranda* warnings, which were given to him no less than three times (once in Spanish through Benito) and which he told Agent Vezzeris he understood. Moreover, after receiving his warnings, appellant stated that he was willing to answer questions. He thus knowingly waived his constitutional rights, see, *United States v. Reed*, 526 F.2d 740, 742-743 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976); *United States v. Duvall*, 537 F.2d 15, 23 (2d Cir.), *cert. denied*, 426 U.S. 950 (1976), and the statements he made were properly received in evidence.³

³ It is interesting to note that trial testimony concerning appellant's dealings, in *English*, with Allen Miller supports even further Judge Pratt's findings.

POINT II**The District Court Properly Admitted Testimony Concerning Prior Similar Acts.**

Appellant contends that the district court abused its discretion by allowing the admission of the testimony of Secret Service Agents concerning his and Benito Nunez's dealings with Perez and Agent McCool. He claims the evidence was not only irrelevant but also bolstered the credibility of witness Perez and obscured the "distinctions" made by Perez between appellant and his confederate in crime, Benito. We submit that such a contention is baseless, especially in view of the underlying purpose of the evidence and the manner in which the trial judge controlled its applicability.

"[Other] crimes evidence is admissible on the government's case in chief unless introduced solely to show the defendant's criminal character, provided that its probative worth outweighs its potential prejudice." *United States v. Torres*, 519 F.2d 723, 727 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975). See also, Fed. R. Evidence 404(b). Obviously proof of appellant's involvement in prior counterfeit dealings was offered not to establish his "character" but, among other reasons, to substantiate his participation in an identical crime either as principal or aider and abettor. Such proof was relevant to show appellant's intent to take part in the December 2nd scheme involving Miller, his knowledge of the consequences of and his awareness of his acts, and the structure and development of the ultimate crime committed. See, *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975); *United States v. Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973); *United States v. Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); *United States v. Johnson*, 525 F.2d 999, 1006 (2d Cir. 1975); *United*

States v. Catalano, 491 F.2d 268 (2d Cir.), *cert. denied*, 418 U.S. 825 (1974).

Clearly well aware of the law of similar acts, appellant concedes (Br. at 37) that the admission of Perez' testimony was proper. We are thus at a loss to comprehend his argument that the Court's admission of the testimony of Special Agents Vezeris, Hast and McCool was an abuse of Judge Pratt's wide discretion in this area. While we are mindful of the provisions of Rule 403 of the Federal Rules of Evidence which permit a trial judge to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence," we submit that in the balancing of the probative value against unfair prejudice required by the rule, Judge Pratt acted properly. The district court at most merely allowed corroborative evidence to be introduced which independently substantiated the testimony of Perez. We respectfully urge that the evidence adduced from the mouths of the three witnesses was completely relevant to Perez' version of the facts.

Here there was absolutely no prejudice to appellant by the receipt of the agents' testimony. If anything, the evidence presented the jury with the full panoply of the Government's proof of prior misconduct so as not to leave the jury with merely the "gnawing suspicion that appellant might have had something to do with the similar offense, thereby raising a "prejudicial atmosphere of guilt by innuendo." *United States v. Rosenwasser*, 550 F.2d 806, 814 (2d Cir. 1977) (dissent, Gurfein, J.), *petition for cert. pending* [citing *United States v. DeCicco*, 435 F.2d 478, 482 (2d Cir. 1970)].

This multiple defendant case is not of the type where evidence of a similar offense is admitted when it is abundantly clear that the co-defendant who claims prejudice could not have been involved in the similar offense. See *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Payden*, 536 F.2d 541, 543 (2d Cir. 1976); *United States v. DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970). Here, the similar act evidence was clearly relevant to the charges against both appellant and Benito.

Moreover Judge Pratt correctly instructed the jury on the limited use of the similar act evidence:

The Government has presented evidence which it claims establishes that the defendants engaged in other transactions similar to that charged in the indictment. You must not take this evidence as proof of either of the defendants having a criminal character or criminal disposition and you must remember a defendant may be found guilty only if you find beyond a reasonable doubt that he committed the particular offense charged in this indictment.

You may consider, in determining whether a defendant acted with guilty knowledge or intent to defraud, the fact, if you find it true, that the defendant engaged in other transactions similar to those charged in the indictment. The fact that one defendant engaged in similar transactions may be considered in determining the knowledge and intent, but if you find that the Government has clearly and conclusively established that a defendant performed acts similar to that charged in the indictment, then you may use evidence of those similar acts to help you determine, one, whether that defendant knew the notes were counterfeit and, two, whether he acted with in-

tent to defraud. You may consider the similar acts if you find they occurred as evidence of a defendant's knowledge, motive, intent, plan and the absence of any mistake or accident, but you must not rely upon this evidence of other acts for any other purpose.

Remember that the defendants are being tried only with respect to counterfeit money which they allegedly possessed on or about the 2nd of December, 1975. It would be improper for you to convict either of them of a crime not charged in the indictment. Therefore, do not concern yourselves with any possible criminal consequences which the similar acts alleged by the Government might have.

See *United States v. Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).⁴

Indeed, even prior to the Court's charge, the Assistant United States Attorney painstakingly explained to the jury in his summation the nature and applicability of the similar act evidence:

Vezeris observed Jose at the restaurant and I might tell you, ladies and gentlemen, like Judge

⁴ The court also instructed the jury to dispel any of its possible notions of guilt by association:

Mere association is no crime. There is no such thing under our laws as guilt merely by association. The mere presence of a defendant at or about a place where a crime may have occurred, even coupled with that defendant's knowledge of the fact that such a crime is being committed, is insufficient to establish guilt. In order to convict either defendant you must be convinced beyond a reasonable doubt that he knowingly participated in a criminal venture in an effort to make it succeed.

Pratt will tell you, the crimes being charged here are possession of the \$500 of counterfeit bills. That's the charge in the indictment; however, the Government has proven, we submit, and certainly it's up to you as the fact finders to determine whether we have or have not proven what is known as prior similar acts regarding either one defendant, Jose or the other defendant, Benito.

The Court will also tell you that the Government proves these things not to prove or to give you the inference that because an act was committed on one day it follows that the act charged in the indictment was committed. That is not the purpose of the evidence, and I ask you to keep that in mind when you consider this case in the jury room.

The purpose of the evidence is not to show that the defendants had bad character [and] because they have bad character then they're no good here. That's not it at all.

The purpose of the proof is to show that because the defendants engaged in certain similar activities on ~~prior~~ or subsequent occasions, that bears on the question of whether or not they knew what they were doing here. It bears on their intent. It bears on their motive, and we submit that it goes to prove that there was a plan, a scheme, a common design, to deal, possess counterfeit currency. That's the purpose of the Government's proof with regard—You recall there was an incident November 19, October 22. There was other proof in this case and that proof is limited, strictly, for that purpose, to prove two defendants guilty of the charges in the indictment.

POINT III**The Prosecutor's Summation Was Not Prejudicial
And Did Not Deprive Appellant Of A Fair Trial.**

Appellant claims that segments of the prosecution summation were so inflammatory as to seriously prejudice his right to a fair trial. Appellant suggests that rather than delineating the evidence and analyzing the strength of his case, the prosecutor acted improperly by launching heated, inappropriate and unjustified attacks on the defense (Br. at 43). Appellant contends that portions of the summation were tantamount to comments upon appellant's failure to testify, that at certain points the Assistant United States Attorney reverted to "unduly harsh and deprecative language," that argument was made on a fact not in evidence, and that the prosecution mischaracterized and overstated its case, making overstatements which included appeals to the prejudices of the jury. To lay these spurious claims to rest, and to place the Assistant's comments in their proper context and true light, we review the summation.

The Assistant United States Attorney commenced summation by reminding the jury of the promise that he had made during opening that the Government would prove beyond a reasonable doubt that appellant and his confederate were in fact guilty of the charge contained in the indictment. Prior to reviewing the elements of the crime, he asked the jury to think about the last witness, Perez, a police officer, who obviously had proven during trial that he was a citizen who cared about people. The prosecutor observed that during the Perez cross-examination the defense "knocked him" in an attempt to make "a mockery of a man who came forward and did what at least we hope every citizen in this country would do. He came forward with information about a

counterfeiter, two counterfeiters". The prosecutor reasoned that as the Nuneze's dealt with "impunity" in their possession of counterfeit money, in a like vein they attempted through cross-examination to attack Mr. Perez.⁵

The prosecutor pointed out that the case was all about "possessing counterfeit money." He then focused his attention on the importance of the case and the true nature of the crime in terms of the community standards:

What is this whole business about counterfeit money? You remember these bills (indicating), and you have every right to take the money into the jury room later on, \$50s, \$20s. What's so important about this? Anybody get hurt? No.

You heard some question about muggings or other things? Nobody got hurt in this case. No guns, no violence.

What's so important about counterfeiting? Ask yourselves, each of you on the jury, working people, some of you now unemployed, some of you are retired, and yourselves what's money all about in this system—(919-920).

At this point appellant registered an unspecified objection to which the Court replied:

THE COURT: Mr. Teitler, there is an objection. The objection is overruled. I think it is within the grounds of fair argument in the issues of this case.

⁵ For example, during the lengthy cross-examination of Perez, the defense accused him of testifying in Court for the purpose of currying the favor of the Government which allegedly would help him become a policeman. Perez was also accused of being a counterfeiter himself, or, in the alternative, an eager beaver super law and order man especially after he testified as an Auxiliary policeman he was "the eyes and ears of the law."

The prosecution continued:

MR. TEITLER: You get up in the morning at seven o'clock, go to work, earn money, pay for your children's education, if you have children. You worry about paying the landlord. You're worrying about living in our society, a society which was built upon the economics of the dollar bill, not a phony dollar bill, a real dollar bill.

What is counterfeiting? It goes to the heart of the very economic system that we all live under. That's what this case is all about.

There's an old Biblical saying, "Who is the wealthy man? He's the one who is happy with his lot".

That's what the sages tell us.

Some people earn money, are satisfied in life. They work, they go through the trials and tribulation, the anxieties, the depressions of life, to support themselves and their family.

You worry about retirement, that you should have enough to live with, enough to buy food.

Other people aren't happy with that statement by our sages——

(920-921)

At this point appellant again voiced an objection specifically claiming at side bar that he took issue with the prosecutor's terminology that this was a "counterfeiting" case. At side bar the Court noted:

Before you begin, I don't look kindly upon objections to summations; but proceed.

Counsel for appellant stated:

MR. ASEN: "These defendants are not on trial for counterfeiting. It's a counterfeit possession case."

And that:

MR. ASEN: "I think what Mr. Teitler is doing is bringing in an inference so inflammatory at this point that if he persists in this way I will have to move for a mistrial again. It's the same argument."

* * * * *

The Court observed that:

"I do not consider anything that he has said, yet, to be inflammatory. It is somewhat strong, and I think Mr. Asen is correct. We are dealing with a possession case. Let's not get it cluttered up with ramifications of other areas where these defendants might or might not be involved that we have no knowledge of it based on this record."

Appellant's trial counsel responded:

MR. ASEN: "Absolutely my point. Thank you."

(921-922)

The four elements of the crime were then reviewed in detail. Reference was made to Allen Miller and the defense's attempt to prove Miller incredible by trying to show that the telephone listing in Buy Lines was not then his true number, thus trying to establish that no telephone calls ever took place (923-924). The prosecutor also recalled Miller's testimony that Miller was not positive that appellant had been to his home in mid-November. The Government urged the jury to find that it was appellant who had dealt with Miller on the prior occasion and "that's how the Nunezes knew that stereo equipment was there and they knew that maybe they could take advantage of a kid who was seventeen years

old." (925). The Assistant requested the jury to note that the Nunezes deliberately did not take the money to a bank or storekeeper, places where persons would carefully scrutinize the bills, but rather passed it off to "a kid that I submit to you they figured was unsophisticated, didn't know anything." The Nunezes thought that "they could get away with the crime." (Id.).

The prosecutor then drew the attention of the jury to the unusual circumstances surrounding the telephone calls to Miller. He pointed to the Nunezes haste in not even retrieving the warranty card instruction booklet, and recalled Miller's testimony that "I don't see anybody who's spending \$500 could do what they did, not be interested at all in what was going on." (927). The prosecutor vigorously urged that all the Nunezes wanted to do was to get rid of the counterfeit bills. He also reminded the jury that the phoney bills were folded and in appellant's pants pocket, as was the real money which was displayed by the Nunezes in an attempt to purchase the scanner (927-928).

The Assistant United States Attorney then argued the inferences to the jury which were apparent from the Nunezes' suspicious actions (928):

Are those the actions of people who can come here in this courtroom, before the bar of justice, and tell you they didn't know that the money was counterfeit? They didn't possess the money? They didn't know what was going on? The money was won somewhere up in a bolita game? We will talk about that in a few minutes.

In scrutinizing the trial testimony the Assistant noted that appellant took the money out of his pocket, handed it to Benito who counted it, and, in turn, gave it to Miller. On those facts, the prosecutor claimed satis-

faction of the possession element of the crime. He opined that these facts were based upon "uncontradicted" testimony (929).

The prosecution chose to fairly comment on the quality of appellant's defense (929):

During the course of the conversation, Allen Miller, he asked them, "Where did you get this money?"

The answer, "Oh, I got it——

"How come it's so crisp?"

"I got it from a bank."

Well, I submit to you this "I Got it from a bank," what's the purpose of the defense here? Remember the expert witness put on the witness stand by Jose? Bolita. That's the difference. Jose.

I submit to you based upon the facts in this case that's absurd. They took a statement about a bank and are creating a whole defense in this case by Jose.

I submit to you that after you consider the evidence you'll determine that that defense is incredible. *In fact, it's so incredible it's ludicrous.* (Emphasis supplied).

The Assistant requested of the jury to consider that perhaps the reason for the Nunezes' refusal of Miller's assistance outside of his building was because they were cautious in preventing him from observing the license plate on their vehicle. The prosecutor summarized his prior points conveying their stealthy activities by stating (Id.):

They were very cautious about how they went about purchasing the stereo equipment. So cautious ladies and gentlemen of the jury, that I submit to you the evidence in this case is overwhelming; that they're criminals of the first order, [of] possessing counterfeit money.

The prosecutor reviewed the facts surrounding Miller's discovery of the true nature of the bills and stated his hope that the jury would take the bills inside the jury room keeping in mind the testimony of the Government's expert who opined that the money was counterfeit. Miller turned out to be "[not] as stupid as the Nunezes thought he would be." (932).

The unusual coincidences of the case were then reviewed. The Nunezes it was suggested "thought they got away with the perfect crime" by not affording Miller the opportunity to see their vehicle and by giving him false telephone numbers. Noting that the area was a high crime area and the suspicions of the New York City Police, the facts of the Nunezes apprehension were detailed. (933-934).

"Where's your bill of sale?"

The Nunezes were too busy trying to get out of Miller's house then to get a bill of sale. That wasn't important to them but that came back to haunt them when they didn't have the bill of sale and they couldn't produce any proof that they owned the stereo equipment.

They tried to be better. They said, "Well, gee, we just bought this equipment, from Allen Miller. Call Miller. He'll tell you."

They had nothing to be afraid of. They did buy it from Allen Miller. They figured once Miller was contacted they would go Scot free. Goodbye.

Yes, the Nunezes thought nobody is as smart as they are.

The summation then moved toward appellant's admissions. Reading from the record itself, the prosecutor called the jury's attention to the Vezeris testimony surrounding appellant's incriminating statements emphasizing that "Agent Vezeris is testifying as to what Jose said out of Jose's own mouth. It's out of Jese's mouth where Jose stated to Vezeris that he knew the bills were counterfeit, and he comes here today and throughout the past number of days arguing, through cross-examination, that he didn't know anything." (940).

After explaining the corroborative nature of the Government agents' testimony and the limited use that the jury was required to make of the similar act testimony (941-942), Benito's statements to Agent Hast were reviewed wherein Benito also admitted to knowledge as to the counterfeit nature of the bill. The prosecutor again explained that this statement was an admission, "the defendant's own verbal account of what he knew in his head and, indeed, it's very difficult to prove what's in a man's head" (943).

The prosecution then discussed the element of the offense requiring the Government to prove that the bills in question were in fact counterfeit. He pointed to the testimony of the Government expert and emphasized the fact that all of the bills were from one negative (948-949).

The jury's attention was then turned to Perez, whom the defense had attacked through cross-examination. The Assistant asked the jury to consider whether Perez was a

liar, an informant, a no good person, a mad human being, or if he had any reason to gain anything by his testimony (953-959) :

The boy has been interested in police work since he's seven years old, virtually all his life. He came across Benito in a counterfitting [sic] class, another little tidbit of coincidence.

Sure, Benito knew about counterfitting [sic]. I submit to you he probably knew—well, the Federal Government, he was taking the Federal Government loan to learn about counterfitting [sic]. This is a non-knowledgable person.

Mr. Perez, never got a dime for his testimony at all, though my able adversary will tell you, "Oh, this fellow is a policeman. He has such"—remember the cross-examination on motive? Spent an hour on motive. An hour.

Remember Mr. Goldberg's question, something about the community could be served, that is God going to be served? Remember that? Laughed at him. That's what they did, and who gets up there as one of the defense witnesses but a policeman. Who get up there to stand up? They laugh at him when it comes to prove the Government's case, but who did Mr. Asen put on the witness stand but a police officer?

Sure, when it suits you to, do it one way. If it doesn't suit you to do it the other way. That's an insult to an intelligent person.

The entire relationship between Perez and Benito was reviewed and again the prosecutor discussed Perez and the *tactics* of the defense in cross-examining him (953-54; 957-58) :

The defense is going to try to make you believe that Mr. Perez, and indeed they did during cross-examination before Mr. Perez took the stand—there was a question asked of one of the agents:

Was Mr. Perez ever arrested? There was all sorts of business about access to money in New York, the theory being, I submit to you, that it was Mr. Perez that was the counterfeiter.

During the course of the summation by defense counsel that is what they are going to tell you, Mr. Perez instigated everything; Mr. Perez is a criminal. Ladies and gentlemen, you heard Mr. Perez. Some criminal. What did he have to gain? He never got paid a dime. He is not a paid informant. He never committed any crime. I asked him were you ever arrested? Were you ever convicted? He never knew that he was coming to this Courthouse until the United States Attorney's Office served him with a subpoena.

Now, I'm going to ask yourselves why would you think that he had anything to gain? What is it, something to gain to stand up in front of the jury and tell lies to people? He did what he did out of the bottom of his heart because he believed about service to his community. You heard him testify to that three, four, five times. He was never paid by the Secret Service. He was never paid by the United States Attorney. Never in his wildest dreams did he believe he was going to be here, but he was here. And I spoke to him.

* * * * *

Well, there is a lot of cross-examination in this case. There was a lot of cross-examination by Mr. Asen and Mr. Goldberg with respect to Mr. Perez. Nothing, or virtually nothing did they

cross-examine him on that had to do with this case. It all had to do with what they were trying to show, I submit, was the psychology of that boy on the witness stand. They are trying to show you that this is unusual conduct, that because he is interested in police affairs alone, and he is trying to make a career for himself—what was he trying to show you—he trumped up the whole story. What else could their position be. That is all they did for one hour in this courtroom.

Did they question him as to the substance, as to the merits of this case? No, not at all. In fact I submit that is what they did with the rest of the witnesses here.

After briefly summarizing the overwhelming evidence against the Nunezes, the prosecutor concluded (960):

I ask you to do one more thing. I ask you on behalf of the United States to bring in a verdict of guilty in this case so that notice will go out to the world to whomever that counterfeit money and possession of counterfeit money will not be tolerated in this country at any time. And by your verdict in this case I am confident sufficient notice will go forth so that those who act like the Nunezes did with impunity will be stopped and others will be prevented from breaking at the very jugular of our economy—dealing with phony counterfeit bills and fraudulent securities of the United States.

In lieu of objecting in open court as he had done before, appellant's trial counsel requested to approach the bench. He stated (961):

MR. ASEN: Your Honor, it is only because of your Honor's instruction to me or advice to me regarding interrupting the summation that I refrained from objecting to the last comment made by Mr. Teitler. That is about the most prejudicial thing that a prosecutor for any federal or state authority could bring in, to ask the jury to bring in a verdict of guilty on behalf of the United States so that the word will go forward. This is not the purpose of a verdict of guilty. The purpose of the verdict, as Mr. Teitler knows, is because he has established the guilt beyond a reasonable doubt. That last remark injects into this case precisely what I alluded to half an hour ago in the middle of his summation when I made my previous objection. Now I have a motion for a mistrial, period.

The Court squarely rejected appellant's motion for a mistrial (962) noting:

The Second Circuit has recently held that you may comment on the failure of the defense to produce evidence as distinguished from the failure of the defendants to take the witness stand.

I listened carefully to what might have been an infraction in that regard and I do not think I found any.

With respect to the other point by Mr. Asen, I do not find that the remarks by Mr. Teitler were inflammatory under the circumstances and certainly not anything that would amount to warrant a mistrial.

So the motions made on behalf of both defendants are denied.

We note at the outset that in *United States v. Danna*, 450 F.2d 1201, 1206 (2d Cir. 1971), this Court wrote:

"Whenever an attorney passes bounds of permissible comment on summation, opposing counsel should object. The Trial Judge could then, if requested, reprove the offending counsel or declare a mistrial.

Here, with two exceptions, appellant did not object to the bulk of the allegedly offending portions of the summation, nor did he request a curative instruction or declarations of mistrial as to them. Clearly, the entire summation was not perceived to have been prejudicial by appellant's trial counsel. His claims of error here, in large part raised for the first time, should not now be noticed on appeal inasmuch as they were not raised below and do not affect his substantial rights, especially in view of the overwhelming strength of the evidence and the fairness of comment in the summation. *United States v. Inciviglio*, 352 F.2d 276, 280-281 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

This Court has held that the "exceedingly fine line which distinguishes permissible advocacy from improper excess is to be drawn within the concrete terrain of specific cases." *United States v. White*, 486 F.2d 204, 205-207 (2d Cir. 1973). We submit that here the record proves that the Assistant refrained from *ad hominem* attacks directed to appellant, *United States v. Benter*, 457 F.2d 1174, 1178 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972) and, similarly did not assert his own belief as to appellant's guilt or make scurrilous remarks about him such as calling him a "liar." *United States v. White, supra*; *United States v. Hestie*, 439 F.2d 13 (2d Cir. 1971). Nor did the Assistant make improper reference to appellant's immorality or general bad character. *Williams v. United States*, 168 U.S. 332 (1897). Moreover, at no time during his summation did the Assistant

bolster the Government's case by placing the prestige of the United States behind its witnesses, *United States v. Puco*, 436 F.2d 761, 762 (2d Cir. 1971), or vouch for the credibility of its witnesses, or state his own opinions. *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973).

The prosecutor never improperly argued to the jury that it should acquit appellant if it believed the Government "framed" appellant, but did, as he was entitled to, make argument to refute appellant's claim and Benito's theory through trial, and later in summation, that the Nunezes were "framed." The Assistant United States Attorney also properly refuted the attacks on the integrity of prosecution witness Perez. *United States v. LaSorsa*, 480 F.2d 522, 526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973). The Assistant merely "[met] the defense on a level of the defense's own choosing" and argued from all inferences supported by the record. *United States v. LaSorsa*, *supra*, at 526. See also, *United States v. Mattio*, 388 F.2d 368, 371 (2d Cir.), *cert. denied*, 390 U.S. 1043 (1968).

Furthermore, at no time did the Assistant argue from a fact not evidence, or make improper inferences from the evidence. The fact that Benito's counterfeit program was subsidized by the Government was a fact in evidence (704) and it was clearly proper to infer that because Perez was the beneficiary of the Government subsidy which applied to the whole course, so, too, was appellant. Nor did the prosecution at any stage misrepresent testimony, display exhibits or documents not in evidence, or make remarks without foundation in the record which tended to degrade appellant. See *Battel v. United States*, 209 U.S. 36 (1908).

In addition, it cannot even remotely be argued that the Assistant commented on appellant's failure to testify within the meaning of *Griffin v. California*, 380 U.S. 609

(1965). The prosecution's comment that certain evidence was "uncontradicted" was recently sanctioned by this Court in *United States v. Rodriguez*, Slip Op. at 3434 (2d Cir. May 11, 1977), which wrote that:

We reject the appellants' argument that by in-direction the United States District Attorney drew attention to defendants' failure to take the stand. The Fifth Amendment and the statutes and cases which apply its teaching do not preclude a prosecutor from telling a jury that certain factual evidence, even if defendants have not conceded its correctness, is "uncontradicted". *United States v. Rodriguez*, 545 F.2d 829, 932 (2d Cir. 1976), *United States v. Arredo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976). Indeed, when considering what does constitute proof beyond a reasonable doubt, it is appropriate and perhaps inevitable for a jury or anyone else to examine not merely the solidity of the offered evidence but the fact that nothing in the record places the proffered evidence in doubt. Hence, the prosecutor has a right to show how strong is his case, even if it be true that it appears that a defendant's failure to take the stand or to offer evidence has left him facing a demonstration of Euclidean inevitability.

Moreover, the prosecutor's final sentence in over a one thousand pages of legal proceedings can in no way be construed as so prejudicial as to have warranted a mistrial below. The Assistant merely, in the context of the community as a whole, attempted to persuade and convince the jury to find the Nunezes guilty and to recognize counterfeiting offenses as serious crimes.⁶

⁶ Appellant's attack on the prosecutor's characterization of him as a "criminal of the first order" is likewise misplaced. A

[Footnote continued on following page]

POINT IV

Appellant's Sentence Was Proper.

Appellant was sentenced, to three years imprisonment, all but six months suspended, and placed on probation for four years, pursuant to 18 U.S.C. § 3651. He now claims that this sentence was improper because it imposed a probationary term longer than that portion of the sentence which was suspended. We believe that the claim is frivolous.

Paragraph two of 18 U.S.C. § 3651 provides that when a sentence for an offense other than one punishable by death or life imprisonment, in excess of six months, is authorized, the court

... may impose a sentence in excess of six months and provide that the defendants be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended *and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.* (Emphasis supplied).

Contrary to the strained interpretation which appellant seeks to place on the wording of the section, the plain language is clear. The length of the probationary term which may be imposed when a split sentence is given is not limited to a maximum equal to the length of the suspended term. The sole limitation, found in the fifth paragraph

criminal, we respectfully submit, is "one who has committed a criminal offense." Black's Law Dictionary (4th ed. 1951). This comment was, in the context of this case, just another way of saying that the prosecution urged that appellant committed the act charged in the indictment. In view of the prior similar criminal conduct shown at trial, we hardly think the comment to have been inappropriate.

of § 3651, is that the probationary term may not exceed five years.

Appellant's argument that there is an ambiguity in the statute is without merit. The statute, as we have shown, is clear on its face. Appellant has proffered no authority to bolster his position that Judge Pratt was without power to impose a probationary period for a greater length than the suspended term of confinement. Moreover, it has been held that under § 3651 the period of probation may exceed the maximum period of imprisonment to which a defendant might have been sentenced. See *Driver v. United States*, 232 F.2d 418 (4th Cir. 1956); *Mitchum v. United States*, 193 F.2d 55 (5th Cir. 1951).

Finally, reliance on *United States v. Teresi*, 484 F.2d 894 (7th Cir. 1973) is hardly apposite to the facts at bar. In *Teresi* the court grappled with a "floating" sentence where the defendant was required to surrender at some unspecified time and, as such, the court found the type of sentence unjustified under the statute, but not void. Nowhere in *Teresi* does the Court explicitly hold that Section 3651 requires the type of construction which appellant urges this Court to apply to him.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
STANLEY A. TEITLER,
Assistant United States Attorney,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 17th day of June 1977 he served a copy of the within

BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

STEPHEN L. BARRETT, ESQ., LEGAL AID SOCIETY, 509 U. S. COURTHOUSE,

FOLEY SQUARE, NEW YORK, NEW YORK 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

17th day of June 1977

BEST COPY AVAILABLE

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-2346824
Qualified in Kings County
Commission Expires March 30, 1979